

IN THE

**SUPREME COURT OF THE
UNITED STATES**

NO. 77-216

THOMAS TOMKO

Petitioner

vs.

HONORABLE HERBERT I. TEITELBAUM
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Respondent

MOTION FOR LEAVE TO FILE A PETITION
FOR WRIT OF PROHIBITION AND/OR
MANDAMUS
AND
PETITION FOR WRIT OF PROHIBITION
AND/OR MANDAMUS

Ronald C. Makoski, Esq.
Bertani, Myers & Makoski
Counsel for Petitioner

Union Trust Building
Main Street
Greensburg, PA 15601

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NO.

THOMAS TOMKO
Petitioner

vs.

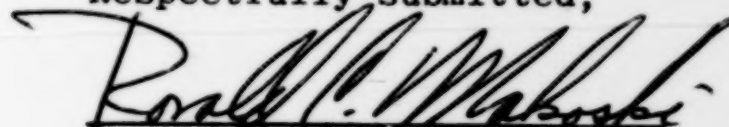
HONORABLE HERBERT I. TEITELBAUM
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
Respondent

MOTION FOR LEAVE TO FILE A PETITION
FOR WRIT OF PROHIBITION AND/OR
MANDAMUS

NOW comes your Petitioner, Thomas Tomko, who respectfully requests that this Honorable Court grant him leave to file the Petition for Writ of Prohibition and/or Mandamus, annexed hereto, pursuant to the provisions of 28 U.S.C. 1651 and Rule 31 of the Rules of the Supreme Court of the United States, and asks that said Writ be directed to the Honorable Herbert I. Teitelbaum Judge of the United States District Court for the Western District of Pennsylvania.

WHEREFORE, your petitioner prays that this motion for leave to file be granted; or in the alternative, that this motion for leave to file be set down for oral argument, following the course pursued in Ex Parte Collett, 335 U.S. 897, 69 S. Ct. 295, 93 L. Ed. 432 (1948), and related cases.

Respectfully submitted,



Ronald C. Makoski, Esq.
Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

THOMAS TOMKO
Petitioner

vs.

HONORABLE HERBERT I. TEITELBAUM
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
Respondent

PETITION FOR WRIT OF PROHIBITION
AND/OR MANDAMUS

Your Petitioner, Thomas Tomko, by and through his counsel, Ronald C. Makoski, Esq., respectfully petitions this Court to issue a Writ of Prohibition and/or Mandamus to the Honorable Herbert I. Teitelbaum Judge of the United States District Court for the Western District of Pennsylvania, requiring him to comply with the mandate of the Fifth Amendment to the United States Constitution, and with the mandate of this Honorable Court as set forth in McCarthy v. Arndstein, 266 U.S. 34, 455, S. Ct. 763, 69 L. Ed. 158, (1924); and Lefkowitz v. Turley, 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274, (1973); Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 212, (1972); Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974); as well as numerous other decisions, wherein this Honorable Court has held that the Fifth Amendment privilege against self incrimination applies equally to civil as well as criminal proceedings.

OPINION AND ORDERS BELOW

The memorandum opinion and order dated March 18, 1977 and entered by the Respondent, Honorable Herbert I. Teitelbaum, Judge of the United States District Court for the Western District of Pennsylvania, has not been officially reported. The memorandum opinion and order is reprinted in Appendix A.

The Order of the Respondent, Herbert I. Teitelbaum denying the Petitioner-Plaintiffs motion for an interlocutory appeal pursuant to 28 U.S.C. 1292 (b), is set forth in Appendix B.

The Order of the Respondent, Herbert I. Teitelbaum, directing the Petitioner-Plaintiff to answer the Defendants interrogatories or suffer a dismissal of his action, is set forth in Appendix C.

The Order, without opinion, of the Third Circuit Court of Appeals denying your Petitioners Petition for Writ of Prohibition and/or Mandamus is set forth in Appendix D.

The Order without opinion, of the Third Circuit Court of Appeals denying your Petitioners Motion for reconsideration of his Petition for Writ of Prohibition and/or Mandamus is set forth in Appendix E.

JURISDICTION

The jurisdiction of this Honorable Court rests upon the provision of 28 U.S.C. 1651 and Rule 31 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS,
STATUTES, AND FEDERAL RULES
AND REGULATIONS INVOLVED

Constitutional Provisions Involved:

- (1) The Fifth Amendment to the United States Constitution;
- (2) The Fourteenth Amendment to the United States Constitution.

Statutes Involved:

- (1) 28 U.S.C. 1651.

Rules and Regulations Involved:

- (1) Rule 31 of the Rules of the United States Supreme Court;
- (2) Rule 21 of the Federal Rules of Appellate Procedure;
- (3) Rules 26 and 37 of the Federal Rules of Civil Procedure.

QUESTIONS PRESENTED

I. Can the plaintiff in a civil action be compelled to answer questions, upon civil discovery, which might tend to incriminate him?

II. Does an Order of Court, which directs a Plaintiff in a civil action to answer questions posed at oral depositions and by written interrogatories which would tend to be incriminatory, violate the Plaintiffs rights under the Fifth and Fourteenth Amendments to the United States Constitution?

III. Can the Plaintiff in a civil action be compelled to choose between exercising his Fifth Amendment right against self incrimination, and a waiver of said right entered in order to avoid a court imposed sanction in the nature of a dismissal of his action for failure to answer?

IV. Can a Plaintiff in a civil action be compelled by sanction to answer questions upon discovery which are both irrelevant and privileged, in light of the provisions of Rule 26 of the Federal Rules of Civil Procedure which preclude the discovery of irrelevant or privileged matters?

STATEMENT OF THE CASE

The Petitioner, Thomas Tomko, has commenced a Civil Rights Action pursuant to the provisions of 42 U.S.C. Sections 1343, 1983 and 1985, against two members of the Pennsylvania State Police, in the United States District Court for the Western District of Pennsylvania at C.A. 76-487. The Complaint alleges that said police officers compelled the Petitioner-Plaintiff, against his free will, to act as a police informant and agent. (The original and amended complaints filed at C.A. 76-487 are set forth in Appendix F).

Counsel for the Defendants in C.A. No. 76-487, conducted the deposition of the Petitioner-Plaintiff, Thomas Tomko on January 14, 1977, at which time counsel for the Defendants, sought to question the Petitioner-Plaintiff concerning his involvement in certain alleged illegal and criminal activities which resulted in the criminal prosecution of his brother. The Petitioner-Plaintiff, Thomas Tomko, refused to answer the questions posed by counsel for the defendant officers for the reason that the questions were irrelevant, privileged, and violative of his right against self incrimination as guaranteed by the Fifth Amendment to the United States Constitution.

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, counsel for the Defendants in C.A. No. 76-487

filed a Motion to Compel the Plaintiff to answer the line of questions proposed at the time of the oral deposition. Following the filing of briefs on the questions presented, Judge Herbert I. Teitelbaum filed a memorandum opinion and order dated March 18, 1977, ordering the plaintiff to either waive his Fifth Amendment right against self incrimination and answer the questions posed during discovery, or in the alternative to assert his Fifth Amendment rights and thereby subject himself to sanctions for failure to answer the questions proposed. (The memorandum and order are set forth in Appendix A).

Pursuant to the Order of March 18, 1977, counsel for the defendants in C.A. No. 76-487 directed written interrogatories to the Petitioner-Plaintiff inquiring into the matters concerning which the Petitioner-Plaintiff had claimed his Fifth Amendment privilege at the time of the oral deposition. (The interrogatories directed to the Petitioner-Plaintiff are set forth in Appendix G).

Following the entry of the order of March 18, 1977, counsel for the Plaintiff, Thomas Tomko, sought to obtain an interlocutory Appeal to the Third Circuit Court of Appeals pursuant to 28 U.S.C. 1292 (b). Said motion was denied by the Honorable Herbert I. Teitelbaum by Order dated April 12, 1977. The order of April 12, 1977 is set forth in Appendix B).

Thereafter, counsel for the Defendants filed a request for sanctions

under Rule 37 of the Federal Rules of Civil Procedure. (The request for sanctions is set forth in Appendix I). On May 24, 1977, the Honorable Herbert I. Teitelbaum issued an Order supplementing his Order of March 18, 1977, wherein the Petitioner-Plaintiff was directed to answer the defendants interrogatories or suffer a dismissal of his case. (The Order of May 24, 1977 is set forth in Appendix C).

On May 25, 1977, the Petitioner-Plaintiff filed a Petition for Writ of Prohibition and/or Mandamus with the Third Circuit Court of Appeals seeking an Order which would enforce the Petitioner-Plaintiffs Fifth Amendment rights and which would countermand the Orders of Judge Teitelbaum. The Third Circuit denied the Petitioner-Plaintiffs Petition without opinion on June 2, 1977. (The Order of the Third Circuit Court of Appeals is set forth in Appendix D).

Thereafter, the Petitioner-Plaintiff filed a Motion for Reconsideration of his Petition for Writ of Prohibition and/or Mandamus, and said motion was denied without opinion on June 23, 1977. (The Order of the Third Circuit Court of Appeals denying reconsideration is set forth in Appendix E).

Your Petitioner, having exhausted all available means of protecting his rights under the Fifth and Fourteenth Amendments to the United States Constitution, now Petitions this Honorable Court to issue a Writ of Prohibition and/or Mandamus to the Honorable Herbert I. Teitelbaum, directing him to take no further action to compel the Petitioner to answer

questions upon discovery which would be violative of his Fifth Amendment rights, and directing the Honorable Herbert I. Teitelbaum to vacate the Orders entered on March 18, 1977 and May 24, 1977 directing the Petitioner to Answer questions upon discovery which are violative of Fifth and Fourteenth Amendment rights.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

The questions presented for this Honorable Courts consideration is whether or not the Fifth Amendment right against self incrimination provides protection to a civil Plaintiff against efforts to obtain incriminatory and irrelevant information by means of civil depositions and interrogatories.

The mandate of the Fifth Amendment to the United States Constitution, as well as a long line of decisions rendered by this Honorable Court, clearly supports the proposition that the right against self-incrimination is an inviolate right which is applicable to all types of judicial proceedings, both civil and criminal.

This Honorable Court has acknowledged at least as early as McCarthy v. Arndstein, 266 U.S. 34, 40, 455 S. Ct. 763, 69 L. Ed. 158, 161 (1924), that the right against self incrimination may be invoked by a witness or a party to a civil suit with the same force and effect as if it were invoked in

a criminal proceeding. Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274, 281, (1973); Kastigar v. United States, 406 U.S. 441, 444, 92 S. Ct. 1653, 32 L. Ed. 2d 212, 217, (1972); Murphy v. Waterfront Commission of New York, 378 U.S. 52, 12 L. Ed. 2d 678, 704, 84 S. Ct. 1594, (1964).

Most recently in Maness v. Meyers, 419 U.S. 449, 463, 464, 95 S. Ct. 584, 42 L. Ed. 2d 574, 586, 587, (1975), Chief Justice Burger speaking for the Court stated the applicable law as follows:

"It appears that here the trial judge rejected the Fifth Amendment claim primarily because it was raised in a civil and not a criminal case.... In overruling the claimed privilege the trial judge seems to have accepted the city attorneys contention that the claim is not available in a civil proceeding. We disagree... we recently affirmed the principle that the privilege against self incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory (citations omitted) (emphasis added)."

In another recent decision, Michigan v. Tucker, 417 U.S. 433, 440, 94 S. Ct. 2357, 41 L. Ed. 182, 190, 191, (1974), this Court speaking through Associate Justice Rehnquist re-affirmed long standing precedent, and stated the applicable law in this manner:

"Although the Constitutional Language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited. The right has been held applicable to proceedings before a grand jury (cite omitted) it civil proceeding (cite omitted) to congressional investigations (cite omitted) to juvenile proceedings (cite omitted, and to other statutory inquiries (cite omitted).... The natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage. For example.... Testimony obtained in civil suits, or before administrative or legislative committees, could also prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of those disclosures in a subsequent criminal proceeding (emphasis added)."

The Opinion and Orders rendered by the Respondent, Judge Herbert I. Teitelbaum, dated March 18, 1977, (set forth in Appendix A) and May 24, 1977 (set forth in Appendix E) are comeplling and punitive in nature in that they require the plaintiff to either yield up his right to proceed with his civil

action or in the alternative to yield up and waive the protections accorded to him by the Fifth Amendment. The imposition of sanctions for failure to Answer interrogatories upon the theory of waiver of the privilege against incrimination is without precedent in the Federal Courts of this nation.¹ Charles Allan Wright and Arthur R. Miller in their treatise on Federal Practice and Procedure, Volume 8, section 2018, P. 145, have made the following observations and comments on the state of the law in this area:

"There has been some suggestion that by bringing or defending a civil action a party waives any privilege he may have with regard to questions relevant to the action. It is inconceivable that by exercising his constitutional right to bring or defend an action a person waives his constitutional right not to be a witness against himself, and no case has so held." (emphasis added).

1

The Respondent, Judge Herbert I. Teitelbaum, in his memorandum opinion of March 18, 1977 cites Independent Production Corp. v. Loew's Inc., D.C. N.Y.,

This Honorable Court has gone to great lengths to assure that a person shall be accorded the Fifth Amendment right not to bear witness against himself unless he chooses to do so of his own free will, and most importantly, that he is to suffer no penalty as a result of the exercise of his rights. Spevack v. Klein, 385 U.S. 511, 514, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574, (1967); Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, 1493, 12 L. Ed. 2d 653, (1964).

In the Spevack decision, supra, the Court pointed out that the concept of a "penalty" for exercising ones Fifth Amendment rights is not restricted only to a fine or imprisonment, but refers to any sanction which makes assertion of the Fifth Amendment "costly".

The entrance, by the Respondent, of an Order compelling your Petitioner to answer incriminatory depositions and interrogatories or suffer dismissal of his civil lawsuit must clearly be considered a costly punitive sanction in violation of your petitioners Fifth Amendment rights, and contrary to the holdings in the Spevack and Malloy decisions.

1958, 22 F.R.D. 266, 276-278, in support of the position that the Petitioner-Plaintiff must either waive his Fifth Amendment right or subject himself to the sanction of dismissal of his action. The case cited by the respondent is not

This Court has consistently handed down decisions which have acknowledged and enforced a citizens right to invoke the Fifth Amendment in a civil proceeding. Should this Honorable Court now fail or refuse to enforce an identical right, the enforcement of which is requested herein by your Petitioner, it would constitute not only an abrogation of the Fifth Amendment guarantee, but also a denial of due process and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments.

In addition to the compelling Constitutional questions raised by the memorandum opinion and orders entered by the Respondent, Honorable Herbert I. Teitelbaum, there is also a question of the misapplication of Rules 26 and 37 of the Federal Rules of Civil Procedure.

Rule 26 of the Federal Rules of Civil Procedure specifically provides that discovery may only be had of matters that are "relevant" and "not privileged." The Respondent by entering his Orders compelling discovery has violated the very language of the Rule upon which his orders are based.

applicable to the issues presented in the Petitioner-Plaintiffs case. The privileged claimed in the Loew's case was one derived from the First Amendment, a privilege which the Court held did not exist in that case. In what can only be described as dicta in

When applying the language of Rule 26 which precludes the discovery of privileged matters, Courts have time and time again held that a person may refuse to answer questions at a deposition or to respond to interrogatories which might tend to incriminate. Duffy v. Currier, 291 F. Supp. 810, DeAntonio v. Solomon, 41 F.R.D. 447; Koeppler v. Jas H. Matthews & Co., 200 F. Supp. 229; Frieson v. McIntyre, 151 F. Supp. 5; Hope v. Burns, 6 F.R.D. 556; United States v. Fishman, 15 F.R.D. 151; Bowles v. Trowbridge, 160 F. Supp. 48; United States v. 47 Bottles, More or Less of Jenasol, 26 F.R.D. 4, affirmed C.A. 3rd, 1959 264 F. 2d 666.

Despite the clear mandate of the Fifth Amendment, the resolute application of that mandate by this Honorable Court, and the clear meaning of Rule 26 of the Federal Rules of Civil Procedure, your Petitioner, Thomas Tomko, nevertheless stands compelled by Order of the Respondent, Judge Herbert I. Teitelbaum, to answer questions upon civil discovery which clearly tend to incriminate. (The interrogatories which your Petitioner stands compelled to answer are set forth in Appendix G.

the Loew's decision concerning waiver, the Court relied by way of analogy on a discussion of the concept of waiver set forth in Moore's Federal Practice, Volume 4, Section 26.60(6), wherein that commentator discussed an example of waiver in terms of the Fifth Amendment privilege against self incrimination. The example referred to by

Your Petitioner, has heretofore sought relief under 28 U.S. 1651, by filing a Petition for Writ of Prohibition and/or Mandamus with the Third Circuit Court of Appeals. On June 2, 1977, the aforesaid Petition was summarily denied without opinion by the Third Circuit. Subsequent thereto, your Petitioner filed a Motion for reconsideration of his Petition for a Writ of Prohibition and/or Mandamus with the Third Circuit Court of Appeals, and, it too was denied summarily without opinion on June 23, 1977.

The Petitioner now finds himself with a clearly mandated and clearly defined Constitutional right which the United States District Court for the Western District of Pennsylvania and the Third Circuit Court of Appeals have refused to acknowledge or enforce. Therefore, your Petitioner now finds it necessary to turn to this Honorable Court, as the last bastion of his Constitutional right in the hope and belief that this Honorable Court will take the necessary steps to enforce the clear mandate of the Fifth Amendment, as well as the decisions of this very Court which have been rendered in support thereof.

analogy from Moores Federal Practice is contrary to all existing case law dealing with the subject of compelled discovery in derogation of Fifth Amendment rights, and it is also contrary to the provisions of Rule 26(b)(1) of the Federal Rules of Civil Procedure.

RELIEF SOUGHT

Your Petitioner, Thomas Tomko, requests this Honorable Court to issue a Writ of Prohibition and/or Mandamus to the Respondent, Honorable Herbert I. Teitelbaum, directing him to take no further action to compel the Petitioner to answer questions upon civil discovery which might tend to incriminate, or otherwise be in violation of his Fifth Amendment rights; and, your Petitioner, further requests this Honorable Court to direct the Respondent, Honorable Herbert I. Teitelbaum, to vacate the Orders entered on March 18, 1977 and May 24, 1977, in C.A. No. 76-487, pursuant to which the Petitioner has been compelled to answer questions upon civil discovery which are in derogation of his Fifth Amendment rights.

CONCLUSION

Should this Honorable Court decline to enforce the Petitioners rights under the Fifth Amendment, the Petitioner will be left without a remedy or means of enforcing the protections which the Fifth Amendment guarantees. Should the Court decline to enforce the Fifth Amendment in this case, the very provisions and safeguards set forth in the Amendment, long recognized by the decisions of this Court will in effect be abrogated and rendered useless by reason of a failure of enforcement. The loss will

not only be that of your Petitioner, but
that of the American people.

Respectfully submitted,


Ronald C. Makoski
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS TOMKO)	
Plaintiff)	
vs.)	CIVIL ACTION
)	NO. 76-487
WILLIAM E. LEES and)	
PAUL BARTKO)	
Defendants)	

MEMORANDUM AND ORDER

This case is presently before
the Court on Defendants' motion to compel
discovery pursuant to Rule 37 of the
Federal Rules of Civil Procedure.

Plaintiffs' complaint, brought
under 42 U.S.C. § 1985, arises out of
the arrest of his brother, one Edward
Tomko, for violation of the drug laws
in December, 1975. The arrest resulted
from an incident alleged to have
occurred in April or May of 1975, while
Edward Tomko was visiting the Plaintiff
at Clarion College. Plaintiff alleges
that following his brother's arrest,
Defendants threatened to file charges
against him (Plaintiff) as an accomplice
unless he acted as an informant and
police agent. In the face of continuing
threats and harrassment Plaintiff, against
his will, purportedly capitulated.

At a deposition of Plaintiff on January 14, 1977, he refused to answer questions concerning his involvement vel non in his brother's criminal activity, asserting his Fifth Amendment privilege against self-incrimination. It is that refusal that gives rise to Defendants' motion to compel discovery.

Defendants' motion raises a question of basic fairness: Should Plaintiff be permitted to pursue his cause of action against Defendants, while at the same time denying them information which might serve to rebut his charges against them?

In Independent Productions Corp. v. Loews, Incorporated, 22 F.R.D. 266 (S.D. N.Y. 1958), the court, faced with this issue, stated:

"It would be uneven justice to permit Plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, permit Plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense." Id. at 276.

Unquestionably, the above response to Plaintiff's attempt to avoid questions concerning matters which he has raised is the proper one. Although the Fifth Amendment privilege against self-incrimination is applicable to civil proceedings, McCarthy v. Arndstein, 266 U.S. 34 (1924), that privilege

was not intended and cannot now be used by Plaintiff as an offensive weapon, to frustrate Defendants' efforts to defend the charges brought against them.

In granting Defendants' motion to compel discovery, the court is in no way stripping Plaintiff of his privilege against self-incrimination, but rather is merely requiring him to make a choice: he must either answer the questions posed to him in the deposition or, by invoking his Fifth Amendment privilege, subject himself to all appropriate sanctions short of contempt. The interests of fairness and justice require the Plaintiff be put to this choice since he is the party asserting the claim.

Accordingly, Defendants' motion to compel discovery will be granted by appropriate Order.

/s/ Herbert I. Teitelbaum
Herbert I. Teitelbaum
United States District Judge

O R D E R

AND NOW, to-wit, this 18th day of March, 1977, in accordance with the foregoing memorandum of decision in the above-captioned case, IT IS ORDERED that Defendants' motion to compel discovery in accordance with F.R. Civ. P. 37 be and the same is hereby granted and Plaintiff is hereby ORDERED to answer the questions previously posed to him at his deposition on January 14, 1977.

/s/ Herbert I. Teitelbaum
Herbert I. Teitelbaum
United States District Judge

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS TOMKO)	
Plaintiff)	
)	
vs.)	CIVIL ACTION NO. 76-487
)	
WILLIAM E. LEES and)	
PAUL BARTKO)	
Defendants))	

O R D E R

AND NOW, to wit, this 12th day of April, 1977, upon consideration of plaintiffs' motion under 28 U.S.C. §1292(b) to allow an appeal of this Court's interlocutory Order of March 18, 1977, IT IS ORDERED that said motion be and the same is hereby denied.

/s/ Herbert I. Teitelbaum
Herbert I. Teitelbaum
United States District Judge

Ronald C. Makoski, Esquire
Attorney at Law
Bertani, Myers & Makoski
100 North Main Street
Union Trust Building
Greensburg, PA. 15601

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1824 Frick Building
Pittsburgh, PA.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS TOMKO)
 Plaintiff)
)
 vs.) CIVIL ACTION
) NO. 76-487
WILLIAM E. LEES; PHILLIP L.)
WEIN and JACK R. ZERBY and)
PAUL BARTKO)
 Defendants)

O R D E R

AND NOW, to-wit this 24th day of May, 1977, upon consideration of the request for sanctions filed by defendants in the above-captioned case pursuant to Rule 37(b)(2)(c) of the Federal Rules of Civil Procedure, IT IS ORDERED that plaintiff shall respond to defendants' outstanding interrogatories within ten (10) days from the date of this Order. Absent such timely response by plaintiff, the above-captioned action will be dismissed.

/s/ Herbert I. Teitelbaum
Herbert I. Teitelbaum
United States District Judge

copies to;

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1682

THOMAS TOMKO

Petitioner

v.

HONORABLE HERBERT I. TEITELBAUM
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

-Respondent

(D. C. Civil No. 76-487)

Present; WEIS, Circuit Judge, CLARK,
Associate Justice, and GARTH,
Circuit Judge.

O R D E R

After consideration of the Petition
for Writ of Prohibition and/or Mandamus, it
is

ORDERED that the petition is denied.

BY THE COURT:

/s/ Joseph R. Weiss, J.
Circuit Judge

DATED; June 2, 1977 8a

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1682

June 15, 1977

THOMAS TOMKO, Petitioner
vs.

HONORABLE HERBERT I. TEITELBAUM
JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
PENNSYLVANIA,

Respondent

Present; WEIS and GARTH, Circuit Judge

1. Petitioner's Petition for
Reconsideration of Petition
for Writ of Prohibition
and/or Mandamus and the
denial of said Petition by
this Court's order of
June 2, 1977,
2. Copy of this Court's order
dated June 2, 1977, sent
by the undersigned for the
Court's information,

in the above-entitled case.

Respectfully,

enc.
fm

Clerk

The foregoing Motion is/

denied

By the Court,

/s/ Joseph R. Weis, J.
Judge

Dated: June 23, 1977

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS TOMKO)	
Plaintiff)	
)	
vs.)	No.
)	
WILLIAM E. LEES,)	
PHILLIP L. WEIN, and)	
JACK R. ZERBY)	
Defendants)	

COMPLAINT

1. The plaintiff is Thomas Tomko, a resident of Westmoreland County, in the Commonwealth of Pennsylvania, and a citizen of the United States.

2. The defendant, William E. Lees, is a resident of Clarion County in the Commonwealth of Pennsylvania, and is a citizen of the United States.

3. The defendant, Phillip L. Wein, is a resident of Clarion County in the Commonwealth of Pennsylvania, and is a citizen of the United States.

4. The defendant, Jack R. Zerby, is a resident of Clarion County in the Commonwealth of Pennsylvania, and is a citizen of the United States.

5. The matter in controversy in this case exceeds Ten Thousand and 00/100 (\$10,000.00) Dollars exclusive of interests and costs.

6. This action arises under Title 42 of the U. S. Code, Sections 1343, 1983 and 1985 and this Court has jurisdiction of this action under Title 28 of the U. S. Code, Sections 1331, 1332 and 1343.

7. At all times pertinent to this Complaint, the defendant, William E. Lees, was a State Policeman employed by the Commonwealth of Pennsylvania; and the defendants, Philip L. Wein, and Jack R. Zerby, were the Clarion County District Attorney and Assistant District Attorney respectively, and in carrying forth the acts and doing the things hereinafter set forth, said defendants were acting in their respective capacities as stated, under color of law, to wit pursuant to the authority entrusted to them under the laws of the Commonwealth of Pennsylvania.

8. The plaintiff, Thomas Tomko, is no and was at all times pertinent to this Complaint, a college student attending Clarion State College in Clarion, Pennsylvania.

9. On or about December 2, 1975, Edward Tomko, the brother of the plaintiff, Thomas Tomko, was charged with violating the Controlled, Drug, Device, and Cosmetic Act of the Commonwealth of Pennsylvania, as set forth in 35 P.S. Section 780-131. The aforesaid charge against the brother of the plaintiff arose out of an incident which allegedly occurred sometime during the last

week of April or the first week in May of 1975, at which time Edward Tomko paid a visit to the plaintiff herein, Thomas Tomko, at Clarion, Clarion County, Pennsylvania.

10. Subsequent to the arrest of Edward Tomko, the defendant, William E. Lees, contacted the plaintiff, Thomas Tomko, and threatened to file criminal charges against the plaintiff herein as an accomplice to the offense allegedly committed by his brother, Edward Tomko.

11. Although no criminal charges have been filed against the plaintiff herein, the defendant, William E. Lees, has pursued a constant and relentless course of conduct which has been designed, through the use of threats and coercion, to compel the plaintiff, Thomas Tomko, against his will, and contrary to his own personal interests and desires, and at the risk of his personal safety and well being, to become a police agent and informant.

12. As a result of the constant threats of prosecution, as well as other threats, made by the defendant, William E. Lees, and made with the knowledge and agreement of the defendants, Phillip L. Wein and Jack R. Zerby, District Attorney and Assistant District Attorney respectively, the plaintiff has been four (4) times compelled to act as a police agent and informant. In three (3) instances the plaintiff has been sent as a sole agent to make purchases of illegal drugs (marijuana) with monies provided by the defendant, William E. Lees, and on one other occasion has been sent in the company of an undercover narcotics agent to make a purchase of illegal drugs.

13. The defendant, William E. Lees, in addition to coercing and compelling the plaintiff to act as a police agent and informant, also sought, with the knowledge and agreement of the defendants, Phillip L. Wein and Jack R. Zerby, District Attorney and Assistant District Attorney respectively, to compel the plaintiff against his will and desires, and against his Constitutional right against self incrimination, to testify in a Court of law against his brother Edward Tomko.

14. In addition to initially compelling and coercing the plaintiff to become a police agent and informant, the defendant, William E. Lees, has with the knowledge and agreement of the defendants, Phillip L. Wein and Jack R. Zerby, continued to harass threaten and coerce the plaintiff, Thomas Tomko, in order to insure that he would testify against those persons from whom he had purchased illegal drugs.

15. In addition to the threats of prosecution made against the plaintiffs by the defendants, the defendant, William E. Lees, has caused the plaintiff to be exposed in the college community as an uncover police informant, thereby exposing him to the threat of physical harm which has had the effect of interfering with his physical well being and has further operated to interfere with the pursuit of his collegiate education.

16. The plaintiff, Thomas Tomko, has been subjected, because of the aforesaid acts of the defendants, under the color of law and pursuant to the power and

authority vested in the defendants by the Commonwealth of Pennsylvania, to the deprivation of rights, privileges and immunities secured to the plaintiff by the Constitution and Laws of the United States, and more particularly:

(a) His right to personal privacy and security of person;

(b) His right not to be deprived of life, liberty and freedom of action without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution;

(c) His right to be fairly and honestly apprised of the true nature and cause of criminal accusations made against him as guaranteed by the Sixth Amendment to the United States Constitution;

(d) His right to be free from threats and coercion which are designed to compel him to abandon his right not to incriminate himself as guaranteed by the Fifth Amendment to the United States Constitution;

(e) His right to be free from threats and coercion which in themselves constitute abuses of the powers of government and of the law;

(f) His rights reserved or retained under the Ninth

and Tenth Amendments to the United States Constitution;

(g) His right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

17. The plaintiff alleges that in doing the acts and things complained of, the defendants acted individually and as conspirators in a scheme which unreasonably interfered with and deprived the plaintiff of rights guaranteed to him under the Constitution and the laws of the United States as hereinbefore set forth,

18. As a direct and proximate result of the acts of the defendants as hereinbefore set forth, the plaintiff has been interfered with and deprived of privacy, life, liberty, and the pursuit of happiness; and has suffered much distress, anxiety and fear, and has been exposed to threats of physical harm, and has suffered an irreparable interference with his pursuit of a college education, and has suffered embarrassment and a loss of reputation, and has been required to spend substantial money and time in an attempt to protect himself against the threats and coercion of the defendants.

WHEREFORE, the plaintiff, Thomas Tomko, claims damages, both compensatory and punitive, against the defendants, William E. Lees, Phillip L. Wein and Jack R. Zerby, severally, jointly and jointly and severally in an amount in excess of \$10,000.00, plus interest and costs of suit.

AND WHEREFORE, the plaintiff, Thomas Tomko, requests this Honorable Court to enter an Order enjoining the defendants from taking any further action or making any further threats designed to compel the plaintiff to perform any acts which are contrary to his free will and desires.

/s/ Ronald C. Makoski
Ronald C. Makoski
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS TOMKO)	
Plaintiff)	
)	
vs.)	CIVIL ACTION
)	NO. 76-487
WILLIAM E. LEES, PHILLIP L.)	
WEIN, and JACK R. ZERBY)	
and PAUL BARTKO)	
Defendants)	

AMENDED COMPLAINT

AND NOW comes the plaintiff, Thomas Tomko, by and through his counsel, Bertani, Myers and Makoski, who files this amended Complaint in accordance with the Order of Court issued October 27, 1976, granting leave to amend the original Complaint, and pursuant thereto the following cause of action is hereby set forth:

1. The plaintiff incorporates herein by reference paragraphs 1 through 4 of his original Complaint with the same force and effect as if set forth fully herein.

2. The defendant, Paul Bartko, is a resident of Clarion County in the Commonwealth of Pennsylvania, and is a citizen of the United States of America.

3. The matter in controversy in this case exceeds Ten Thousand and 00/100 (\$10,000.00) Dollars exclusive of interest and costs.

4. This action arises under Title 42 of the U. S. Code, Sections 1343, 1983 and 1985, and this Court has jurisdiction of this action under Title 28 of the U. S. Code, Sections 1331, 1332 and 1343.

5. At all times pertinent to this Complaint, the defendant, Paul Bartko, was a State Policeman, employed by the Commonwealth of Pennsylvania.

6. The plaintiff incorporates herein by reference paragraphs 7 through 10 of his original Complaint with the same force and effect as if set forth fully herein.

7. Although no criminal charges have been filed against the plaintiff herein, the defendants, William E. Lees and Paul Bartko, have pursued, and have conspired to pursue, a constant and relentless course of conduct which has been designed, through the use of threats and coercion, to compel the plaintiff, Thomas Tomko, against his will, and contrary to his own personal safety and well being, to become a police agent and informant.

8. As a result of the constant threats of prosecution, as well as other threats, made by the defendants, William E. Lees and Paul Bartko, and made with the knowledge and agreement of the defendants, William E. Lees, Paul Bartko, Phillip L. Wein and Jack R. Zerby, the plaintiff has been at least four times compelled to act as a police agent and informant. On three occasions the plaintiff has been sent as a sole agent

to make purchases of illegal drugs (marijuana) with monies provided by the defendants, William E. Lees and Paul Bartko, and on one occasion was sent to arrange and or make purchases of illegal drugs while in the company of the defendant, Paul Bartko.

9. The defendants, William E. Lees and Paul Bartko, in addition to coercing and compelling the plaintiff to act as a police agent and informant, also sought, with the knowledge and agreements of the defendants, Phillip L. Wein and Jack R. Zerby, District Attorney and Assistant District Attorney respectively, to compel the plaintiff against his will and desires, and against his Constitutional right against self incrimination, to testify in a Court of law against his brother Edward Tomko.

10. In addition to initially compelling and coercing the plaintiff to become a police agent and informant, the defendants, William E. Lees and Paul Bartko, have with knowledge and agreement of the defendants, Phillip L. Wein and Jack R. Zerby, continued to harass, threaten and coerce the plaintiff, Thomas Tomko, in order to insure that he would testify against those persons from whom he had purchased illegal drugs.

11. In addition to the threats of prosecution made against the plaintiffs by the defendants, the defendants, William E. Lees and Paul Bartko, have caused the plaintiff to be exposed in the college community as an undercover

police informant, thereby exposing him to the threat of physical harm which has had the effect of interfering with his physical well being and has further operated to interfere with the pursuit of his collegiate education.

12. The plaintiff, Thomas Tomko, has been subjected, because of the aforesaid acts of the defendants, under the color of law, and by the use of the power and authority vested in the defendants by the Commonwealth of Pennsylvania, to the deprivation of rights, privileges and immunities secured to the plaintiff by the Constitution and Laws of the United States, and more particularly:

(a) His right to personal privacy and security of person;

(b) His right not to be deprived of life, liberty and freedom of action without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution;

(c) His right to be fairly and honestly apprised of the true nature and cause of criminal accusations made against him as guaranteed by the Sixth Amendment to the United States, Constitution;

(d) His right to be free from threats and coercion which are designed to compel him to abandon his right not to incriminate himself as guaranteed by the Fifth

Amendment to the United States Constitution;

(e) His right to be free from threats and coercion which in themselves constitute abuses of the powers of government and of the law;

(f) His rights reserved or retained under the Ninth and Tenth Amendments to the United States Constitution;

(g) His right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

13. The plaintiff hereby alleges that in doing the acts and things complained of, the defendants acted individually and as conspirators in a scheme which unreasonably interfered with and deprived the plaintiff of rights guaranteed to him under the Constitution and the laws of the United States as hereinbefore set forth.

14. As a direct and proximate result of the acts of the defendants as hereinbefore set forth, the plaintiff has been interfered with and deprived of privacy, life, liberty, and the pursuit of happiness; and has suffered such distress, anxiety and fear, and has been exposed to threats of physical harm and has suffered an irreparable interference with his pursuit of a college education, and has suffered embarrassment and a loss

of reputation and has been required to spend substantial money and time in an attempt to protect himself against the threats and coercion of the defendants.

WHEREFORE, the plaintiff, Thomas Tomko, claims damages, both compensatory and punitive, against the defendants, William E. Lees, Phillip L. Wein and Jack R. Zerby, severally, jointly, and jointly and severally in an amount in excess of Ten Thousand and 00/100 (\$10,000.00) Dollars, plus interest and costs of suit.

AND WHEREFORE, the plaintiff, Thomas Tomko, requests this Honorable Court to enter an Order enjoining the defendants from taking any further action, or making any further threats, designed to compel the plaintiff to perform any acts which are contrary to his free will and desires.

/s/ Ronald C. Makoski
Ronald C. Makoski
Attorney for Plaintiff

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS TOMKO)
 Plaintiff)
)
 vs.) C.A. No. 76-487
)
WILLIAM E. LEES: PHILLIP L.)
WEIN and JACK R. ZERBY and)
PAUL BARTKO)
 Defendants)

DEFENDANTS' INTERROGATORIES
PROPOUNDED TO PLAINTIFF

The defendants, William Lees and Paul Bartko, by their attorney, Frederick R. Nene, Assistant Attorney General, pursuant to Federal Rule of Civil Procedure 33 et seq. and pursuant to the Order of Court dated March 18, 1977, serves interrogatories upon the plaintiff, Thomas Tomko, the answers to which must be filed in writing, under oath, within thirty (30) days of the date of service hereof:

1. During the months of April or May, 1975, did you accompany Edward Tomko and Cathy Furda, to the mobile home residence of James Tunie, a student at Clarion State College:

ANSWER:

2. Did you at any time direct your brother to the trailer of James Tunie?

ANSWER;

3. If the answer to Interrogatory #1 is in the affirmative, did you or any of the above-named individuals have on his or her person any marijuana or other illegal drugs?

ANSWER:

4. If the answer to Interrogatory #2 is in the affirmative, did you have in your possession any marijuana or other illegal drug at the time you visited the trailer of James Tunie?

ANSWER:

5. Did you at any time arrange or facilitate a meeting between Edward Tomko and James Tunie for the purpose of transferring or selling marijuana or other illegal drugs from one party to the other?

ANSWER:

6. Did you at any time arrange or facilitate the sale of marijuana or other illegal drugs between your brother Edward Tomko and any other individual?

ANSWER:

7. If the answer to the above interrogatory is affirmative, give the names and addresses of the individuals involved.

ANSWER:

8. Are you aware of any occasions prior to the arrest of Edward

Tomko on December 2, 1975 in which your brother sold marijuana or any illegal drug to any student at Clarion State College?

ANSWER:

9. If the answer to Interrogatory #8 is affirmative, did you arrange or facilitate such sale?

ANSWER:

10. If the answer to Interrogatory #8 is affirmative, were you present at any such sale?

ANSWER:

11. State the names and addresses, if known, of any other individual who was present at any sale specified in Interrogatory #8.

ANSWER:

12. Sometime during the months of April or May, 1975, were you ever in the presence of a Clarion State College student named Ed Schneider when Edward Tomko had quantities of marijuana or drugs being offered for sale?

ANSWER:

13. If the answer to Interrogatory #13 is affirmative, gives the names, dates, amount of marijuana or drugs for sale and the sale price of said items?

ANSWER:

14. Prior to the arrest of Edward Tomko on December 2, 1975, did you or anyone in your presence ever purchase drugs or marijuana from Edward Tomko? If the answer is yes, give the details of time, place, identity, amount, and price of said purchase.

ANSWER:

15. During the time referenced in Interrogatory #13 did Edward Tomko ever give you or anyone in your presence any marijuana or other drug? If yes, give details of such gift.

ANSWER:

16. Did you ever give James Tunie your brother Edward's telephone number?

ANSWER:

17. If your answer to Interrogatory #16 is affirmative, what was the purpose of giving Tunie your brother's phone number?

ANSWER:

18. Did you ever tell James Tunie he could call Edward Tomko collect?

ANSWER:

19. If the above answer is affirmative, what was the reason for so informing James Tunie?

ANSWER:

20. Who first informed you that your brother had been arrested on December 2, 1975?

ANSWER;

21. Did Corporal William Lees of the Pennsylvania State Police ever advise you that there existed sufficient cause to charge you with being an accessory in your brother Edward's criminal conduct?

ANSWER:

22. Did you ever relate to Corporal Lees details concerning your brother Edward's activity in selling marijuana and/or other drugs?

ANSWER:

23. If the above answer is affirmative, specifically detail the information you so related?

ANSWER:

24. Did you ever inform Corporal Lees that Edward Tomko purchased illegal drugs or marijuana from an individual named Sammy who brought contraband to Pennsylvania from the State of Arizona?

ANSWER:

25. If the above answer is affirmative, give the details of such trafficking.

ANSWER:

26. Did you ever see quantities of marijuana in your brother Edward's trailer? If the answer is yes, give details of time and amounts.

ANSWER:

27. Did you ever see quantities of cocaine or LSD in your brother Edward's trailer? If the answer is yes, give time and amounts.

ANSWER:

28. Did you witness a female student named Robyn purchase a quantity of drugs or marijuana from Edward Tomko in front of the Sigma Tau Fraternity House in November, 1975?

ANSWER:

29. If the answer to the above is yes, identify the amount of drugs or marijuana and the cost.

ANSWER:

Respectfully submitted,

/s/ Frederick R. Nene
Frederick R. Nene
Assistant Attorney General

Robert P. Kane
Attorney General

COMMONWEALTH OF PENNSYLVANIA ;
COUNTY OF | ss;

Thomas Tomko being first duly sworn according to law deposes and states that the foregoing Answers to Interrogatories are true and correct to the best of his knowledge, information and belief.

Thomas Tomko

Sworn to and subscribed
before me this _____ day of
_____, 1977.

Notary Public

APPENDIX H
A True and Correct Copy
ATTEST: /s/ Frederick R. Nene

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS TOMKO)	
Plaintiff)	
)	
vs.)	C.A. No. 76-487
)	
WILLIAM E. LEES; PHILLIP L.)	
WEIN and JACK R. ZERBY)	
Defendants)	

MOTION TO COMPEL DISCOVERY

The defendants, by their attorney, Frederick R. Nene, Assistant Attorney General, move the court, pursuant to Federal Rule of Civil Procedure 37 to compel the plaintiff to answer certain questions which the plaintiff refused to answer at a deposition made by defendants on January 14, 1977. This motion is made for the following reasons:

1. The plaintiff brought a civil rights action against two officers of the Pennsylvania State Police, alleging that the conduct of the defendants deprived the plaintiff of constitutionally protected rights.

2. More specifically the plaintiff alleged that the defendants threatened to file criminal charges against the plaintiff in connection with a criminal charge filed against the plaintiff's brother.

3. At a deposition taken on January 14, 1977, the plaintiff refused to answer questions concerning his involvement or non-involvement in his brother's criminal activity.

4. Since the deponent is the complaining party, and since the information sought is relevant to the subject matter involved, the plaintiff is deemed to have waived his right to claim that such information is privileged. 4 Moore's Federal Practice 26.60(6).

Therefore, the defendants request the court to issue an order directing the plaintiff to answer written interrogatories concerning the plaintiff's involvement or non-involvement in his brother's criminal activity.

/s/ Frederick R. Nene
Frederick R. Nene
Assistant Attorney General

APPENDIX I

A True and Correct Copy
ATTEST: /s/ Frederick R. Nene

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS TOMKO	:	
Plaintiff	:	
vs.	:	C.A. No. 76-487
WILLIAM E. LEES; PHILIP L.	:	
WEIN and JACK R. ZERBY and:	:	
PAUL BARTKO	:	
Defendants	:	

REQUEST FOR SANCTION PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 37(b)(2)(C)

The defendants, by their attorney, Frederick R. Nene, Assistant Attorney General, move the court, pursuant to Federal Rule of Civil Procedure 37(b)(2)(C) to enter an order dismissing the action for the following reasons:

1. On or about March 2, 1977 the defendants moved the court to compel discovery in accordance with Federal Rule of Civil Procedure 37.

2. By order of court dated March 18, 1977 the court ordered the plaintiff to answer those questions that he had refused to answer when deposed on January 14, 1977.

3. On or about April 15, 1977, counsel for the defendants served counsel for the plaintiff twenty-nine (29) interrogatories.

4. As of this date, May 19, 1977, the plaintiff has not responded to said interrogatories.

Therefore, the defendants request the court, pursuant to Federal Rule of Civil Procedure 37(b)(2)(C) to dismiss the action or in the alternative to enter judgment by default against the plaintiff.

/s/ Frederick R. Nene
Frederick R. Nene
Assistant Attorney General

Robert P. Kane
Attorney General